

**IN THE COURT OF APPEALS  
OHIO FIRST APPELLATE DISTRICT  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080342
		TRIAL NO. B-0610052
Plaintiff-Appellee,	:	
		JUDGMENT ENTRY.
vs.	:	
JAMES P. MILLER,	:	
Defendant-Appellant.		

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Following a plea agreement, defendant-appellant James Miller was convicted of arson<sup>2</sup> and felonious assault.<sup>3</sup> In this appeal, Miller argues that the trial court improperly overruled his motion to withdraw his guilty plea, and that his counsel was ineffective. We affirm.

Miller first contends that the trial court erred in overruling his withdrawal motion. A motion to withdraw a guilty plea before sentencing should be freely granted where there is a reasonable basis for withdrawal of the plea.<sup>4</sup> In deciding whether to grant a motion to withdraw a guilty plea before sentencing, courts consider whether: (1) the accused was represented by competent counsel; (2) the accused was given a full Crim.R. 11 hearing before entering the plea; (3) a full hearing was held on the motion; (4) the trial court gave full and fair consideration to the motion;<sup>5</sup> (5) the motion has been made within a reasonable time; (6) the motion sets out specific reasons for the withdrawal;<sup>6</sup>

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> R.C. 2909.03.

<sup>3</sup> R.C. 2903.11.

<sup>4</sup> *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715, citing *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1224, and *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

<sup>5</sup> See *id.*, citing *State v. Peterseim* (1979), 68 Ohio App.2d 211, 428 N.E.2d 863.

<sup>6</sup> See *State v. Mathis* (May 30, 1990), 1<sup>st</sup> Dist. No. C-890286.

(7) the accused understood the nature of the charges and possible penalties; and (8) the accused is perhaps not guilty of or has a complete defense to the charge or charges.<sup>7</sup>

In this case, Miller's withdrawal motion came before sentencing. Miller's basis for withdrawal of his guilty plea was that he wanted to pursue an insanity defense. Miller also stated that the plea agreement had not been honored: "[T]his isn't the plea bargain I agreed to. It was an F2, not an F1." On appeal Miller also notes that the trial court failed to account for his mental distress as evidenced by the following statements: "I really need some help. I need mental help. I do. I mean, you should have noticed I'm mentally distressed. I was when I pled guilty. I only did [the crimes] because I thought I could please her, but there is no pleasing her."

During sentencing, the trial court noted that Miller had undergone a psychiatric evaluation performed by Dr. Carla Dreyer. Dr. Dreyer concluded that Miller could not establish a valid insanity defense.

Moreover, Miller failed to present facts indicating that he was insane at the time of the offense. An insanity defense requires that a defendant prove by a preponderance of the evidence that at the time of the offense's commission, he did not know, as a result of a severe mental disease or defect, the wrongfulness of his acts.<sup>8</sup>

Miller never sought to establish that he did not know the wrongfulness of his acts, and he likewise failed to advance any facts suggesting the same. Miller cites only his voluntary intoxication as indicia of insanity at the time of the commission of the offense. But voluntary intoxication may not be taken into account in determining the existence of a mental state that is an element of a criminal offense.<sup>9</sup> "Moreover, voluntary intoxication is a different legal concept than a not-guilty-by-reason-of-insanity defense, which requires an inability to decipher right from wrong due to a severe mental disease."<sup>10</sup> As in *State v. Smith*, Miller has failed to advance or allege facts sufficient to establish a viable insanity defense; and at best, he alleged voluntary intoxication, which

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<sup>7</sup> See *Fish*, supra.

<sup>8</sup> *State v. Lavelle*, 5<sup>th</sup> Dist. No. 07-CA-130, 2008-Ohio-3119.

<sup>9</sup> *State v. Smith*, 11<sup>th</sup> Dist. No. 2005-T-0080, 2006-Ohio-4669, ¶17, citing R.C. 2901.21(C).

<sup>10</sup> Id., citing R.C. 2901.01(A)(14).

in this instance was no defense at all. And Miller's later advancement of an insanity defense belies his competence and lucidity at the Crim.R. 11 hearing, where he acknowledged that: he understood the charges; he was thinking clearly at the hearing; nothing had interfered with his ability to understand the proceedings; a guilty plea is a complete admission of guilt; and he was making the plea voluntarily. On this record, Miller could not establish an insanity defense, and his late motion to withdraw his guilty plea was properly overruled.

Likewise, Miller's assertion that he did not know that he was pleading guilty to a first-degree felony is belied by the fact that, during the Crim.R. 11 hearing, Miller was repeatedly told that he was pleading guilty to a first-degree felony.

The record shows that Miller was guilty and that his assertion that he was not guilty by reason of insanity was meritless. The trial court did not abuse its discretion in overruling Miller's motion, and his assignment of error to the contrary is meritless.

Miller also contends that his trial counsel's assistance was ineffective because his attorney allegedly failed to zealously advocate in favor of his withdrawal motion. The record reflects that Miller's counsel was skeptical of whether Miller's withdrawal motion had a reasonable basis: "I don't know if that would be considered a left-handed motion to withdraw his plea. I guess it's going to be your call, but [my client and I] did discuss it this morning, and I told him that it was my recollection [that] the paperwork indicated that [we had agreed to plead to an F1 and not an F2]."

In making an ineffective-assistance claim, the defendant must show that (1) counsel's performance was deficient, and (2) the deficiency prejudiced the defendant.<sup>11</sup>

Even if Miller could show that his trial counsel's performance was deficient, he cannot show prejudice. As we have noted, the trial court properly overruled Miller's motion to withdraw his guilty plea, and the evidence supported the trial court's conclusion that Miller could not successfully plead not guilty by reason of insanity—an argument to the contrary could not have been sustained. Counsel's candor at the

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<sup>11</sup> See *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

hearing did not rise to deficient performance, and even if it had, it did not prejudice Miller. This assignment of error is overruled.

Because Miller's assignments of error have no merit, we affirm the trial court's judgment. A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., HILDEBRANDT AND PAINTER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on April 22, 2009

per order of the Court \_\_\_\_\_.  
Presiding Judge